

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**SHIRLEY A. MEISENHEIMER**

Claimant

VS.

**HALLMARK CARDS**

Self-Insured Respondent

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Docket No. 1,001,355

**ORDER**

Respondent appealed the October 19, 2006, Order for Post Award Medical Treatment entered by Administrative Law Judge Brad E. Avery. The Board placed this post-award proceeding on its summary docket for disposition without oral argument.

**APPEARANCES**

Chris Miller of Lawrence, Kansas, initially represented claimant but during the pending of this appeal Mr. Miller was replaced by Chris Cowger of Lawrence, Kansas. John D. Jurcyk of Roeland Park, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board on this appeal includes the transcript of the June 20, 2006, hearing before Judge Avery, the transcript of the August 31, 2006, deposition of Dr. Christopher L. Wertin and the record that is identified in the April 4, 2006, Award entered by Judge Avery. The record also includes the medical report from Dr. Dick Geis that was generated following his February 7, 2006, examination of claimant, which was performed at the Judge's request.

**ISSUES**

Claimant injured her right elbow, wrist and arm working for respondent. The parties stipulated the appropriate date of accident for this claim was January 2, 2002.

On April 4, 2006, Judge Avery entered an Award granting claimant benefits for a four percent disability to her right upper extremity under the schedules of K.S.A. 44-510d. The parties did not appeal that decision. But shortly after the Award was entered, on

April 14, 2006, claimant filed an application with the Division of Workers Compensation to request post-award medical treatment.

In the October 19, 2006, Order for Post Award Medical Treatment, Judge Avery granted claimant's request for chiropractic treatment. The Judge found claimant was experiencing substantial pain and implicitly found the requested medical treatment was reasonable and necessary. In addition, the Judge noted claimant's condition had not changed since her November 2005 regular hearing.

Respondent contends Judge Avery erred. Respondent argues the greater weight of the evidence indicates medical treatment is not necessary and the chiropractic treatment she has undertaken is merely elective. Respondent also argues claimant should have been required to show some change in her physical condition before she would be entitled to receive additional medical treatment. Accordingly, respondent argues the Board should deny claimant's request for additional treatment.

Conversely, claimant contends the October 19, 2006, Order should be affirmed. Claimant argues she is entitled to receive additional treatment as it is reasonable and necessary to treat the injuries she received working for respondent. She also argues that K.S.A. 44-510k, the post-award medical statute, does not require proof of a change of physical condition.

The only issue on this appeal is whether claimant is entitled to receive additional treatment from Dr. Christopher L. Wertin at the expense of respondent.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant injured her right elbow, wrist and arm working for respondent. On April 4, 2006, Judge Avery awarded claimant permanent disability benefits for a four percent disability to her right upper extremity. The Award also stated "[c]laimant is entitled to future medical care upon application and review."<sup>1</sup>

On April 14, 2006, claimant filed an application to request additional treatment with her chiropractor, Dr. Christopher L. Wertin. The parties appeared before Judge Avery at a June 20, 2006, hearing, where claimant testified. After considering the evidence

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<sup>1</sup> ALJ Award (April 4, 2006) at 3.

presented in this post-award proceeding, the Judge granted claimant's request for treatment with Dr. Wertin, until further order.

At the June 2006 hearing, claimant testified her symptoms have not changed for the past several years. She also testified she first obtained treatment from Dr. Wertin for her right upper extremity symptoms four, five or six years ago. Moreover, she described how Dr. Wertin used a device that immediately relieved the pain she experienced in her right upper extremity.

Claimant testified at her November 2005 regular hearing that she was receiving treatment from Dr. Wertin. When asked if there was any reason why she could not have requested Dr. Wertin's services be authorized before this claim was litigated, claimant indicated she was merely following her attorney's instructions.

Q. (Mr. Jurcyk) Is there any reason you couldn't have come to court and asked the judge to authorize Dr. Wertin before we tried this case?

A. (Claimant) I suppose I could. I was just doing what my attorney told me to do.<sup>2</sup>

Respondent relied upon the testimony of the doctors who testified before the April 2006 Award was entered – Drs. Wayne R. Tilson; John B. Moore, IV; Vito J. Carabetta; Mary Ann Hoffmann and Edward J. Prostic.

One of the doctors who testified before the April 2006 Award was entered was internal, emergency and occupational medicine physician Dr. Wayne R. Tilson. Dr. Tilson first examined claimant in December 2001 and last saw her in February 2002. The doctor released claimant from medical treatment and recommended she continue stretching exercises and using her wrist splints as needed. In addition, the doctor switched claimant's prescription for Vioxx to over-the-counter medications as needed. The doctor's final diagnosis was right arm pain. And although the doctor was not asked whether claimant needed additional medical treatment, the doctor indicated that he did not believe in February 2002 that any care on his part would make any difference in the short term.<sup>3</sup>

Dr. John B. Moore, IV, who is board-certified in plastic and reconstructive surgery and who holds an additional certificate in hand surgery, saw claimant in June and July 2002 and again in January 2003. From his contact with claimant, Dr. Moore did not believe he could offer her additional treatment as she was not a surgical candidate. But he did feel claimant might need to see Dr. Carabetta from time to time for steroid injections or physical

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<sup>2</sup> P.A.H. Trans. at 19.

<sup>3</sup> Tilson Depo. at 13.

therapy for the tenderness in her right wrist and elbow. Dr. Moore diagnosed tendinitis around the right wrist area and bicipital tendinitis in her right elbow, which the doctor attributed to her being 62 years old.

Another doctor who testified before the April 2006 Award was entered was Dr. Vito J. Carabetta, who is board-certified in physical medicine and rehabilitation. The doctor was selected by respondent to examine claimant. The doctor examined claimant's right upper extremity in April 2003 and diagnosed chronic right forearm tendinitis. Moreover, the doctor testified that sometimes tendinitis does not resolve.

For many people even without treatment a tendinitis problem can resolve on its own even without specific treatment. For some of us it may require some degree of treatment to bring about resolution. For some people it may be mostly clear and for some people there may not be much improvement and that can be dependent on a multitude of variables.<sup>4</sup>

At the time of his evaluation Dr. Carabetta did not believe further medical treatment would benefit claimant and, regrettably, claimant would have to live with her ongoing symptoms.<sup>5</sup>

Dr. Mary Ann Hoffmann, who examined claimant one time in July 2004, testified claimant had no impairment from her work-related injuries and that claimant's symptoms were absent at the time of the examination. Dr. Hoffmann, who is a board-certified orthopedic surgeon, did not make a diagnosis for claimant's right arm. The doctor, however, noted in the medical records that claimant did not require any further care for her right forearm symptoms "other than the occasional chiropractic visit, which seems to relieve her symptoms, and I have nothing further to offer her as far as that is concerned."<sup>6</sup>

Board-certified orthopedic surgeon Dr. Edward J. Prostic, who evaluated claimant at her attorney's request in September 2005, concluded claimant had a partial thickness tear of the biceps tendon at the elbow. But Dr. Prostic did not believe there was any additional treatment that would be beneficial to claimant. Moreover, when he testified in November 2005, he was unaware of any chiropractic treatment for the elbows that would be beneficial.

As indicated above, the record also includes the medical report of Dr. Dick Geis, who examined claimant at Judge Avery's request. The doctor saw claimant on

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<sup>4</sup> Carabetta Depo. at 11.

<sup>5</sup> *Id.* at 13.

<sup>6</sup> Hoffmann Depo., Ex. 2 at 2.

February 7, 2006, and determined claimant had flexor strain and tendinitis in her right arm. Part of the history Dr. Geis recorded was that claimant had experienced some symptoms in the left upper extremity due to overuse. The doctor concluded claimant's "symptoms [were] stable and further treatment [was] not felt likely to cause improvement in pain or functional abilities."<sup>7</sup> Moreover, as observed by Judge Avery, Dr. Geis believed claimant was experiencing significant pain.

The opinions from the various doctors as set forth above are helpful to the extent they establish claimant's condition at the time of her examinations. But except perhaps for Dr. Prostig, none of the medical evidence addresses the *specific* treatment that claimant presently requests nor contradicts claimant's testimony that she readily benefits from Dr. Wertin's treatment. And it must be remembered that none of the doctors who testified before the Award was entered have seen claimant for quite some time and, therefore, they are not cognizant of claimant's present condition and ongoing symptoms.

Dr. Wertin was the only expert witness to testify after the April 2006 Award was entered. Dr. Wertin first began providing claimant with chiropractic treatment in November 1990 but more recently he had begun treating her right wrist, elbow, forearm, and hand. The doctor testified that he first treated claimant's shoulder in April 2004. And in May 2004 he worked on both of her arms. Since the May 2004 visit, he believes he has worked on claimant's arms almost every visit.

After reviewing his records, Dr. Wertin testified he saw claimant three times in May 2004, twice in June 2004, once in July 2004, once in August 2004, three times in August 2005, three times in September 2005, once in October 2005, and then again in January 2006, when he began seeing her about every three or four weeks, except for a period when he saw her almost every week.

Dr. Wertin believes claimant's right elbow problem is from either a bicipital tendon injury, flexor strain, pronator teres muscle injury, or a combination of all three. According to the doctor, claimant's condition is chronic and his treatments only provide temporary relief. Moreover, the doctor indicated his treatment restores the use of claimant's arm.

Q. (Mr. Jurcyk) Is her need for treatment today on an ongoing basis any different than it was when you started treating her in 2004, I think you said?

A. (Dr. Wertin) No, I don't think so. I mean I could -- when she gets an adjustment from me she gets some relief but it's temporary. She knows it and I know it and it

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<sup>7</sup> Geis Report (filed Feb. 15, 2006) at 6.

lets her get by and she waits until she just absolutely has to come in to get her arms [sic] so that it works again, then she gets another adjustment.<sup>8</sup>

Dr. Wertin further believed the treatment he provided claimant really seemed to provide her relief.<sup>9</sup>

The evidence establishes that claimant experiences ongoing pain in her right upper extremity as a result of the work-related injury she sustained working for respondent. That pain is significant and limits the use of her arm. The treatment from Dr. Wertin, however, temporarily relieves her right arm pain and thus restores the use of her arm.

Any time after the entry of an award, an injured worker may apply for additional medical benefits. The standard or test the judge is to apply is whether the requested treatment is necessary to cure or relieve the effects of the worker's work-related accident. The Act provides:

At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care *if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury* which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.<sup>10</sup> (Emphasis added.)

The statute does not require a change of condition.

"[W]hen a statute is clear and unambiguous, the court must give effect to the legislative intent therein expressed rather than make a determination of what the law should or should not be. Thus, no room is left for statutory construction."  
"When determining whether a statute is open to construction, or in construing a

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<sup>8</sup> Wertin Depo. at 14.

<sup>9</sup> *Id.*, Ex. 1.

<sup>10</sup> K.S.A. 44-510k(a).

*statute, ordinary words are to be given their ordinary meaning, and courts are not justified in disregarding the unambiguous meaning. . . .”*

When reviewing questions of law, a court may substitute its opinion for that of the administrative agency. Where the language used is plain, unambiguous, and appropriate to an obvious purpose, the court should follow the intent as expressed by the words used. The courts are to give language of statutes their commonly understood meaning, and it is not for the courts to determine the advisability or wisdom of language used or to disregard the unambiguous meaning of the language used by the legislature.<sup>11</sup>

The Board finds and concludes claimant has proven Dr. Wertin’s treatment is necessary to relieve her symptoms of right upper extremity pain and, therefore, claimant should receive that treatment as authorized treatment as ordered by the Judge. Accordingly, the October 19, 2006, Order for Post Award Medical Treatment should be affirmed.

The question of whether claimant’s attorney should receive attorney fees under K.S.A. 44-510k(c) has not been raised and, therefore, is not presently before the Board. Any issues surrounding that matter should first be taken up before the Judge.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>12</sup> Accordingly, the findings and conclusions set forth above reflect the majority’s decision and the signatures below attest this decision is that of the majority.

### **AWARD**

**WHEREFORE**, the Board affirms the October 19, 2006, Order for Post Award Medical Treatment entered by Administrative Law Judge Brad E. Avery.

**IT IS SO ORDERED.**

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<sup>11</sup> *Boucher v. Peerless Products, Inc.*, 21 Kan. App. 2d 977, 980-981, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996) (alteration in original) (citations omitted).

<sup>12</sup> K.S.A. 2005 Supp. 44-555c(k).

Dated this \_\_\_\_ day of February, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Chris Cowger, Attorney for Claimant  
Chris Miller, Attorney for Claimant  
John D. Jurcyk, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge